IN THE
SUPREME COURT OF THE UNITED STATES
_____ Term, 19____

NO. 79-459

LOCAL 736, WILLIAMSPORT FIREFIGHTERS, SMITH, JONATHAN; SAMPSON, DENNIS; EMERICK, RICHARD; CHILSON, DENNIS; HILL, DANIEL; DOCHTER, WILLIAM; ANTHONY, HAROLD; STONE, JEFREY; & BICCHLE, LAWRENCE, Individually and on behalf of all other Williamsport City Residents, Taxpayers and those protected by Williamsport Firefighters

vs.

CITY OF WILLIAMSPORT, KIRBY, DANIEL, MAYOR; and PAGANA, CHARLES; LUCASI, STEVEN; HIPPLE, RANDALL; STAIMAN, MARVIN; BAILEY, THOMAS; CURCHOE, CARL; and HUNTER, CARL, as the CHIEF ELECTED OFFICIALS and members of the Williamsport City Council

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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CITATIONS

STATEMENT OF THE CASE

The Respondents disagree with some of the Statement Of The Case as set forth in the Petition. First of all, with respect to 3.5 of the Statement of the Case, it should be pointed out that contrary to the assertion by the Petitioners, the "courtesy of the floor" was not for a short period of time, as the time period to be spent on the courtesy of the floor was unrestricted in any manner except that each individual is limited by City Ordinance to speaking no longer than three minutes at any one time, but after giving a three minute statement, the individual may again seek re-recognition to make another three minute statement. With respect to 3.6 and 3.7, it should be pointed out that those items are not part of the Agreed Statement of Facts and therefore should not be set forth as subparts of Item 3 in the Statement of the Case set forth by the Petitioners. With respect to point 5 of the Statement of the Case set forth by the Petitioners, it is pointed out that the assertion concerning the Pennsylvania law relating to lay-off of a fireman for "reasons of economy" is totally inaccurate. The Pennsylvania case law does not limit lay-offs for "reason of economy" to only those situations where the employees to be laid-off are unneeded, there has been some in advance study, or the efficiency of the department would not be lowered.

It is also submitted by the Respondents that the following information is relevant and significant with regard to the determination of whether the prayed for Petition should be granted:

On November 29, 1978, the Mayor of the City of Williamsport presented to the City Council of the City of Williamsport his proposed operating budget for calendar year 1979. Because of the increased labor

costs and other expenses, coupled with loss of funding from various sources, the Mayor's recommended budget called for a tax increase of 5½ mills, and the elimination of thirty positions which were carried in the 1978 budget. Of the thirty positions eliminated, nine were positions which were vacant due to attrition, and the elimination of the other twenty-one positions required layoffs. (Agreed Statement of Facts, 9.2 and 9.3) Of the twenty-one layoffs, nine were Williamsport City firemen. Although the budget presentation on November 29, 1978, set forth the elimination of positions and the tax increase, specifics of the positions to be eliminated were not made public on the 29th of November, as the Mayor wanted to notify the individuals affected personally. The individuals personally affected were notified of the layoffs by letter dated December 1, 1978, from the Mayor directly to each of them. The letter in question is attached as Exhibit A to the Agreed Statement of Facts and speaks for itself.

The gathering of the data for the preparation and presentment of the operating budget for the City of Williamsport for calendar year 1979 was a lengthy and involved procedure; (Appendix 32A-35A). Since the procedure surrounding the budget preparation may be of interest to your Honorable Court, the following summary is offered. A budget schedule for submission by the various department heads is drawn up by the Office of Finance and Personnel (32A-33A), and the budget requests are received by the Mayor in public sessions with public input permitted at the time of the submissions. After the various budget requests are received from the department heads, the Mayor assembles the budget requests and the income projections and compiles an overall budget which is submitted to City Council of the City of Williamsport

for review. The City of Williamsport budget is a line item budget and is gone over line item by line item by City Council, and with respect to each line item, City Council has the authority to adopt the Mayor's recommendation, decrease the line item, or increase the line item.

Subsequent to receipt of the budget by Williamsport City Council, various budget work sessions were held. At the budget work sessions other than those scheduled for the regular Thursday meetings, no public input with respect to the budget was permitted. However, with respect to the budget sessions held on December 7, 1978, December 14, 1978, and December 21, 1978, public input was permitted and received by Williamsport City Council. Copies of the minutes from these public sessions were submitted as Exhibits D, E, and F to the Agreed Statement of Facts. (Appendix 36A-59A).

REASONS FOR REFUSING TO GRANT THE PETITION

In urging the Court to grant the Petition, the Petitioners relied upon three considerations as set forth in the Supreme Court Rule 19: (1) that the affirmance by the Court of Appeals was a decision which departed from Supreme Court authority. (2) That the District Court and the Circuit Court have decided a federal question in a matter directly in conflict with applicable decisions of the Supreme Court. (3) That both lower Courts have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of your Honorable Court's power of supervision.

In the Petition filed, as at the other stages of this case, the Petitioners contend that the case of **Genes vs. City of Duquesne,** 27 Pa. Cmwlth. 620, establishes

the criteria for layoffs for "reasons of economy" and that economy layoffs must be limited to the removal of unneeded employees, or the removal of firemen to improve efficiency, and requires an advanced study. However, it is respectfully submitted that this representation as to what **Genes** stands for is totally inaccurate. Since the Petitioners are relying so heavily upon the case of **Genes vs. City of Duquesne,** supra, it is important to very closely examine the factual circumstances in **Genes**. The City of Duquesne laid off four firefighters and based the layoffs on "reasons of economy," at a time when the real estate taxes for the City were reduced by one mill. The four firemen argued that the layoffs were not for "reasons of economy" but were for political reasons, in that Mayor-elect Valco and two members-elect of the City Council had run on a platform pledging to reduce the tax burden for the citizens of the City of Duquesne. Therefore, the argument submitted on behalf of the four firemen was that the layoff of these four employees at a time when the tax rate was being reduced by one mill was not for "reasons of economy," but rather political and in keeping with the campaign platform on which the individuals ran and were elected. Since in **Genes**, the layoffs were accompanied by a decrease in the tax rate, the Court had to determine whether "reasons of economy" was broad enough to encompass a decrease in size of the work force at the same time as there was a decrease in the tax rate. The Commonwealth Court held that the phrase "reasons of economy" was broad enough to support a layoff of unneeded employees, regardless of the financial condition of the City. Counsel for the Petitioners seizes on this language to assert that only "unneeded employees" can be laid off for "reasons of economy." It is respectfully submitted that this contention is not supported by the **Genes**

case. As counsel for the Respondents understands **Genes**, what the Commonwealth Court stated was that unneeded employees can be laid off, regardless of the financial condition of the City, and that those layoffs can be called layoffs for "reasons of economy." However, it is submitted that this case clearly does not hold that in order to justify layoffs for "reasons of economy" the City must show that the employees to be laid off are unneeded, especially when the layoffs are necessary in order to reduce the necessity for a larger tax increase as here. The Commonwealth Court in **Genes** went on to state that under the phrase "other reasons," layoffs which would increase the efficiency of the department would be justified. Counsel for the Petitioners seizes on this language to assert that the City of Williamsport would have to show that the layoffs would increase the efficiency of the department in order to establish that the layoffs were for "reasons of economy." However, this assertion on behalf of the Petitioners is incorrect. Since the reason for the layoffs in the present situation were solely for "reasons of economy," any consideration of what would have to be shown in order to establish a layoff for "other reasons" has absolutely no application to the present layoffs.

In Pennsylvania layoffs for reasons of economy by Third Class cities are governed by State Statute, 53 P.S. Section 39871 which provides: "If for reasons of economy, or other reasons, it shall be deemed necessary by any city to reduce the number of paid members of any fire department, or the number of fire alarm operators or fire box inspectors in the bureau of electricity, then such city shall follow the following procedure:

First, if there are any paid firemen, fire alarm operators or fire box inspectors eligible for retirement under the terms of any pension fund, then such reduction in numbers shall be made by retirement on pension of all the oldest in age and service.

Second, if the number of paid firemen , fire alarm operators and fire box inspectors eligible for retirement under the pension fund of said city, if any, is "insufficient to effect the reduction in number desired by said city...." Reading the Statute clearly shows that layoffs for "reasons of economy" are not limited to layoffs of unneeded personnel, or layoffs which would increase the efficiency of the department, and does not require any advance study prior to the layoff. A review of the Statute shows that firemen are not permanent employees with a Constitutional right to a pre-termination hearing when the layoff is for "reasons of economy."

It is submitted that under the **Genes** case as well as other Pennsylvania cases, firemen are terminable "at will" for reasons of economy. In **Kraftician v. Borough of Carnegie,** 35 Pa. Cmwlth. Ct. 460, 386 A. 2d 1064 (1978), a Borough police officer was challenging his furlough. Kraftician was one of two Borough police officers who were furloughed for "reasons of economy" while two non-civil service employees of the police department designated as "special police" were retained. The Borough code with respect to furloughs for reasons of economy, 53 P.S. Section 56190, is substantially the same as the Third Class City Code provision covering the same subject matter. In reviewing and upholding the furlough of Kraftician, the Commonwealth Court stated, "The only limitation imposed on the power of a municipality to act in a reduction of its police civil service work force for economy or other reasons is that it must act in good faith.". (at p. 473) As Chief Judge Nealon so aptly stated in his

consideration of the holding in **Kraftician**, "The point of that requirement is that a municipality may not use "reasons of economy" as a ruse in order to layoff a municipal employee who the authorities wish to discharge for other reasons. The good faith requirement would not be for the benefit of the general citizenry should have no concern with which particular firemen are discharged." (at p. 8, lower court Opinion) See also **Borough of Cannonsburg v. Flood** Pa. Cmwlth. Ct. _____, 387A. 2d 951 (1978). In **Pennsylvania State Lodge Fraternal Order of Police v. City of Wilkes-Barre,** _____ Pa. Cmwlth. Ct. _____, 388 A. 2d 1146 (1978), the Commonwealth Court upheld the dismissal of the assumpsit complaint by the county court, finding that neither the arbitration award nor the Third Class City Code mandates the number of police officers a municipality must have, but rather it is up to the municipality council to determine the number of policemen to employ. After reviewing this case, Chief Judge Nealon aptly stated, "I see no reason why the law would be any different with firemen.". (at p. 9 of lower court Opinion).

Petitioners assert that the decision by the Middle District Court, which was affirmed by the Court of Appeals for the Third Circuit represent a departure from the decisions by your Honorable Court in a number of cases. However, a review of these decisions eluded to show that this assertion is basically incorrect.

In **Bishop v. Woods** 426 U.S. 341 (1976), your Honorable Court affirmed the termination of a police officer without a hearing stating: "The federal court is not the appropriate forum in which to review the multitue of personnel decisions that are made daily by public agencies. We must accept the harsh fact that

numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.". The police officer in that case was dismissed in accordance with the city ordinance allowing for the discharge of police officers for failure to perform work up to the standard of his classification, or if the officer was negligent, inefficient, or unfit to perform his duties. Following his discharge, the police officer filed suit contending that under the ordinance he was a permanent employee and thus entitled to a pretermination hearing. In rejecting the contention that the officer had a property interest in continued employment your Honorable Court found that the ordinance did not confer such status on the officer. A review of the Statute involved in the present case, 53 P.S. Section 39871 shows that the Statute does not confer a property interest in employment to firemen when the layoffs are for "reasons of economy." Thus, the decision of the Middle District Court and the Court of Appeals is totally consistent with the decision of your Honorable Court in the **Woods** case.

Furthermore, a review of the dissenting opinions filed in the **Woods** case shows that the decisions in this case are not inconsistent with the dissenting opinions. The dissenting opinion authored by Mr. Justice Brennan shows that the primary concern is

that the employee was not given a pretermination hearing in a situation where his good name, reputation, honor or integrity was at stake. However, in the present situation, the termination of the individual for "reasons of economy" does not bring into play any question of the employee's good name, reputation, honor or integrity and thus there is no need for a due process hearing for the purpose of according the employee an opportunity to clear his name. With respect to the dissenting opinion authored by Mr. Justice White, it is counsel's understanding that this opinion expresses concern for the lack of a due process hearing in a situation where the employee can only be discharged for cause. Reviewing the Pennsylvania Statute in question establishes that layoff for "reasons of economy" do not require a showing of cause and therefore the concern expressed by Mr. Justice White is not present in this case. In the dissenting opinion authored by Mr. Justice Blackmun, the primary thrust of the opinion deals with the "for cause" standard for dismissal which was heretofore pointed out, which is not the standard involved under the Pennsylvania Statute when dealing with layoffs for "reasons of economy." Since the termination of firemen under the Pennsylvania Statute for reasons of economy is "at will" as opposed to "for cause" the decision of the District Court and the affirmation by the Third Circuit Court of Appeals is not inconsistent with the dissenting opinions in **Woods.**

The Petitioners likewise assert that the lower court opinions are a direct departure from the decision of your Honorable Court in **Memphis White Gas and Water Division v. Craft** 436 U.S. 1 (1978). However, a review of **Craft** shows that in that particular case, your Honorable Court was faced with the question of whether or not the public utility was permitted to

terminate service "at will" under certain law or only was permitted to terminate for "good and sufficient cause." Having made the determination that the services were not terminable at will, but rather required good and sufficient cause, your Honorable Court then determined that there was in fact a property interest which entitled the consumer to a pretermination hearing. It is submitted that the decisions in the lower courts in the present case are not inconsistent with the **Craft** decision and are not a departure from the **Craft** decision since the employment of firemen is terminable "at will" for reasons of economy in accordance with the State Statute and the State decisional law.

In **Perry v. Sinderman** 408 U.S. 598 (1972) your Honorable Court was reviewing a Federal action brought by a junior college professor without tenure whose work contract was not renewed, and who was not given an explanation for the failure to renew nor was he given a pretermination hearing. The thrust of the action brought by the professor was that the decision not to rehire him was based on public criticism of the administration and thus infringed his free speech right and although there was no official tenure system under the formal tenure setup, he had an expectancy of re-employment. In affirming the decision by the Court of Appeals, your Honorable Court pointed out that these two assertions presented a bona fide constitutional claim and that the professor was entitled to attempt to prove his allegations. With respect to the claim of "property" interest, your Honorable Court pointed out that a person's interest in a benefit becomes a property interest for due process purposes if there are rules or mutually explicit understandings that support his claim of entitlement to the benefit and if such rules or mutually explicit understandings exist, the individual is entitled to a

pretermintation hearing. Your decision in **Perry** is not applicable to the present case inasmuch as the Petitioners are not contending that the layoff was an infringement of their right of free speech, and are not contending that there were any rules or mutually explicit understandings that when layoffs are made for "reasons of economy" that city firemen have a claim of entitlement to continued employment abasent "sufficient cause." It is respectfully submitted that the decision by the Middle District Court and the affirmation by the Third Circuit Court of Appeals is entirely consistent with the decision in **Perry.**

In **Board of Regents of State Colleges v. Roth** 408 U.S. 564 (1972) your Honorable Court was reviewing another situation where an untenured professor was not rehired and was offered no explanation or hearing prior to termination. In holding that the non-retention of the respondent was not tantamount to a deprivation of liberty and that he had no property interest protected by procedural due process, your Honorable Court emphasized the fact that in declining to rehire the teacher, the State did not make any charge against him which might seriously damage his standings and associations in the community and that there was no suggestion that in declining to re-employ the respondent this imposed upon him a stigma or other disability that foreclosed other employment opportunities to him. With respect to the question of property interest, your Honorable Court stated, "to have a property interest and a benefit, the person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." (at p. 577) Your Honorable Court found that although the teacher had an abstract concern in being re-hired, there was no State Statute, or rule or policy

that "secured his interest in re-employment or that created any legitimate claim to it.". (at p. 578) It is respectfully submitted that the decision in the present case is totally consistent with **Roth** as the layoffs for "reasons of economy" did not adversely effect the individuals' good names, reputations, honor or integrity and further there is no State statute, or rule or policy creating any legitimate claim to employment by the nine individuals.

In **Goldberg v. Kelly** 397 U.S. 254 (1970) your Honorable Court was reviewing whether a recipient of public assistance was entitled to a pretermination hearing before such benefits were cut off. That portion of the **Kelly** decision, which is relevant with regard to the present situation, deals with the question of whether the benefits are constitutionally protected property. Your Honorable Court found that such benefits are a matter of statutory entitlement for persons qualified, and therefore the recipient is entitled to a pretermination hearing. The necessity for the pretermination hearing is founded on the statutory entitlement of the recipients. In our present case, there is no such statutory entitlement, and therefore a pretermination hearing is not required.

In **Mathews v. Eldridge** 424 U.S. 319 (1976) the primary focus of your Honorable Court is on the question of whether the termination procedure with respect to social security benefits meets due process requirements. Since the property interest in receipt of social security benefits is obviously created by statute, your Honorable Court did not have to decide the question of whether there was a property interest in the receipt of social security benefits. In the present case, the Pennsylvania Statute does not create a property right in continued employment when the

layoffs are for "reasons of economy." Thus, the decisions by the lower courts in this case are not a departure from the holding by your Honorable Court in **Eldridge.**

In **Gross v. Lopez** 419 U.S. 565 (1975) your Honorable Court was reviewing the suspension of high school students for misconduct without a presuspension hearing. In holding that the students were entitled to notice and a hearing your Honorable Court focused on the fact that the alleged misconduct could seriously damage the reputation of the students and hamper later educational and employment opportunities. Since the suspension under the applicable statute required cause, i.e. misconduct, the students were entitled to notice and a hearing at which they could dispute the allegation of misconduct. In the present case, the layoffs were for "reasons of economy" and thus those subject to layoff did not suffer a damaged reputation and would not be impaired in later employment opportunities. Since no cause or misconduct on the part of the individuals was asserted to support the layoff, it follows that no notice and opportunity for pretermination hearing was required. It is submitted that the lower court decisions are entirely consistent with your decision in **Lopez.**

Not withstanding the assertions of the Petitioners that the lower court decisions are a departure from the above discussed decisions of your Honorable Court, it is clear the lower court decisions are in complete accord with your prior decisions.

CONCLUSION

For the reasons assigned above, the Petition for Certiorari should be denied.

Respectfully submitted,

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